SUPREME COURT, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1966

S. EDWARD BLOOM,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in the above-entitled cause on September 23, 1966.

Opinion Below

The opinion of the Supreme Court of Illinois is reported in 220 N.E. 2d 475; .... Ill. 2d ..... .

Jurisdiction

The judgment of the Supreme Court of Illinois was entered on September 23, 1966. On December 20, 1966, Mr. Justice Clark of this Court entered an order herein extending the time for filing a petition for writ of certiorari to and including February 18, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

Questions Presented

1. Is a defendant in a State Court trial for criminal contempt entitled under the Fourteenth Amendment to the Constitution of the United States to a trial by jury particularly where the conduct alleged as contempt is not petty or trivial but is a felony under the law of the State?

2. Do not *Cheff* v. *Schnackenberg* (1966) 384 U. S. 373 and the Fourteenth Amendment to the Constitution of the United States require jury trials in State Court criminal contempt proceedings where the sentence imposed amounts to two years?

3. Is a State Court in imposing a sentence for criminal contempt limited by the Fourteenth Amendment to the Constitution of the United States to such sentence as it could impose only for petty offenses under the law of the State?

4. Does not the Fourteenth Amendment to the Constitution of the United States prohibit a State Court trial judge presiding at a contempt trial from conducting a private investigation into an alleged contemner's conduct and receiving a secret report with respect thereto *in camera* prior to such trial?

5. Does not the comment of a State Court prosecutor on the failure of an accused to take the stand in his own behalf deprive the accused of his rights to due process under the Fifth and Fourteenth Amendments to the Constitution of the United States?

Constitutional and Statutory Provisions

The Constitution of the United States:

Amendment V. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * * nor shall any person be * * * deprived of life, liberty or property, without due process of law * * *"

Amendment VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the Statee and district wherein the crime shall have been committed, * * * and to be informed of the nature and cause of the accusation * * *."

Amendment XIV. "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the State of Illinois:

Article II, Section 5, "The right of trial by jury as heretofore enjoyed shall remain inviolate * * *."

Article II, Section 9, "In all criminal prosecutions, the accused shall have the right to * * * a speedy public trial by an impartial jury * * *."

Illinois Criminal Code of 1961. S.H.A. ch. 38:

Section 1 - 3. "No conduct constitutes an offense unless it is described as an offense in this Code or another statute of this State. However, this provision does not affect the power of the court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order, civil judgment or decree."

Section 2-11. "'Misdemeanor' means any offense other than a felony and includes conduct prohibited by a statute which provides no penalty for its violation."

Section 1-7(e). "All sentences to the penitentiary shall be for an indeterminate term. * * *"

Section 1-7(f) "All sentences of imprisonment other than to a penitentiary shall be for a definite term which shall not exceed one year."

Section 1-7(j). "The court in imposing sentence upon an offender convicted of an offense for which no penalty is otherwise provided may sentence the offender to a term of imprisonment not to exceed a year or a fine not to exceed $1,000 or both."

Section 17-3.(a) "A person commits forgery when, with intent to defraud, he knowingly: (1) Makes or alters any document apparently capable of defrauding another in such manner that it purports to have been made by another or at another time, or with different provisions, or by authority of one who did not give such authority; or (2) issues or delivers such document knowing it to have been thus made or altered; or (3) Possesses, with intent to issue or deliver, any such document knowing it to have been thus made or altered.

(b) An intent to defraud means an intention to cause another to assume, create, transfer, alter or terminate any right, obligation, or power with reference to any person or property.

(c) A document apparently capable of defrauding another includes, but is not limited to, one by which any right, obligation or power with reference to any person or property may be created, transferred, altered or terminated.

(d) Penalty. A person convicted of forgery shall be fined not to exceed $1,000 or imprisoned in the penitentiary for one to 14 years or both."

Statement*

1. This matter arose in the Probate Division of the Circuit Court of Cook County, Illinois, upon the amended petition of the State's Attorney of that county charging petitioner with conduct claimed to constitute criminal contempt of that court (Abst. 49-52). The conduct relied upon as a basis for this charge was the presentation by petition of an alleged spurious Will of one Melody for admission to probate when he knew or should have known that such Will had been prepared and falsely executed and witnessed after Melody's death (Abst. 50-52). The same conduct, if true, was violative of the provisions of section 17-3 of the Illinois Criminal Code of 1961 and punishable by sentence of one to fourteen years and/or a fine not to exceed $1000 *S.H.A. Ch. 38, § 17-3.* No proceeding, however, was instituted against petitioner under the Criminal Code. In such event, petitioner would have been entitled to a jury trial. Illinois Constitution, Art. II §§ 5 and 9; *S.H.A. Ch. 38*; § 103-6.

The issues posed by the amended petition could not be tried summarily, nor were they, since they involved proof by respondent of facts relating to the preparation, execution and witnessing of the Will outside the presence, constructive or otherwise, of the trial court and therefore beyond its personal knowledge and observation. When the cause came on for full trial, petitioner timely moved for a jury trial which motion was denied (Abst. 86).

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* Petitioner seeks a writ of certiorari here on three claims of denial of constitutional rights. In order to more clearly delineate these claims, he sets forth the facts with respect to each separately in this Statement.

During the trial petitioner by testimony raised a question of fact as to his lack of malevolent intent, a necessary element and requisite of criminal contempt under Illinois law* (Abst. 93-110). After hearing all the evidence at a trial lasting approximately 10 days, the trial court found petitioner's conduct in the above respects to be in derogation of the court's dignity and its orderly processes (Abst. 78). It thereupon adjudged him in criminal contempt and sentenced him to the Cook County jail for a period of 24 months (Abst. 78).

2. Approximately two months prior to the filing of respondent's petition (Abst. 44) and three months prior to their amended petition (Abst. 49), the trial court upon the petition of an heir claiming under a prior Will of Melody, (Abst. 4-17) appointed one Fink as *amicus curiae* in this Estate (Abst. 17). Under the terms of this order, Fink was authorized and empowered to investigate all matters pertaining to the preparation, execution and filing of the Melody Will presented by petitioner and to prosecute any fraud which he discovered attending same and to make "full report to the Court from time to time" (Abst. 18).

More than 30 days before any petition was filed by respondent against petitioner, the trial court entered its order on Fink to file instanter his report covering his investigation to that date (Abst. 40). This report was filed with the trial court itself and remained continuously in its own possession despite petitioner's efforts to examine it prior to trial (Abst. 71, 89, 90). In this connection the trial court granted petitioner full access to the files and court records which it had impounded

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* *People* v. *Koniecki,* (1961) 28 Ill. App. 2d 488; *People* v. *Hille,* (1915) 192 Ill. App. 139.

but did not disclose that it had withheld the Fink report therefrom (Abst. 76).

At the trial, petitioner was permitted limited examination of this report and then only insofar as it bore upon the testimony of any witness testifying for respondent and as an aid to cross-examination of such witness (Abst. 89, 90). Fink was not called as a witness by the respondent. After judgment, the trial court denied petitioner's motion to turn the Fink report over to the Clerk of the Court in order for it to be made part of the record on appeal (Abst. 83, 84).

3. After the presentation of all the evidence, the State's Attorney in his summation commented on the failure of petitioner to testify in his own behalf. (Abst. 110). On objection by petitioner, the trial court ruled such comment to be proper argument (Abst. 110).

4. Upon direct appeal of petitioner's contempt conviction to the Supreme Court of Illinois, petitioner asserted as to all of the above matters a deprivation of his constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States. That court, however, affirmed the conviction. In so doing, it held that petitioner was not entitled to a jury trial on the authority of *Green* v. *United States*, (1958) 356 U. S. 165, 183 and *United States* v. *Barnett*, (1964) 376 U.S. 681 (App. 3a). As to petitioner's arguments directed to the use of the Fink report and the prosecutor's improper argument, the Supreme Court of Illinois never reached the constitutional portion thereof and decided the questions involved purely on the basis of petitioner's failure to show prejudice (App. 4a, 5a).

Reasons for Granting the Writ.

1. The decision of the Supreme Court of Illinois in affirming petitioner's sentence of 24 months for criminal contempt after a trial in which he was denied a jury deprives petitioner of his rights and privileges under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. That decision was based largely on decisions of this Court including *Green* v. *United States,* (1958) 356 U. S. 165 and *United States* v. *Barnett,* (1964) 376 U. S. 681 which were firmly relied upon as establishing that criminal contempts "are not subject to jury trial as a matter of constitutional right" and that the exercise of summary contempt power is not restricted to "trivial" or "petty" offenses (App. 3a).* In these respects, the decision overlooks important modifications in the area of trials of criminal contempts as recently set forth by this Court in *Cheff* v. *Schnackenberg* (1966) 384 U.S. 373, and appears to conflict with it.

In *Cheff,* the Chief Justice and Mr. Justices Clark, Brennan and Fortas held that a jury trial is not a matter of right in a contempt proceeding only because such a proceeding is "equivalent to a procedure to prosecute a petty offense" which under federal law does not require a jury trial. Stating that criminal contempt of itself does not "warrant treatment otherwise," these four Justices held that "sentences exceeding six months for criminal contempt may not be imposed by federal courts

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* The power to deal with contempt was not exercised *summarily* in the case at bar. The contempt charged was not disobedience of a Court order as in *Barnett* nor within the personal knowledge or observations of the trial court. It is difficult to tell exactly why the Illinois Supreme Court made this reference at all.

unless a jury trial has been received or waived." This result was reached because 18 U.S.C. Sec. 1 defines a petty offense as any misdemeanor, the penalty for which does not exceed imprisonment for six months. In view of this, the six month sentence imposed in *Cheff* was affirmed. Mr. Justice Harlan, joined by Mr. Justice Stewart, concurred in this decision but on the different ground that there is not right at all to a jury trial in criminal contempts. In this connection and in opposition thereto, they described "the Court's decision" as being one "to extend the right to jury trial to criminal contempts ending in sentences greater than six months" which they claimed was contrary to prior decisions of this Court. Mr. Justice Douglas and Black dissented on the principal grounds that all criminal contempts are crimes and that therefore the right to trial by jury in such cases is guaranteed.

The *Cheff* case thus discloses the present alignment in this Court on this subject as follows:

a) Six Justices hold that jury trials are constitutionally required in all federal criminal contempt cases where the sentence imposed is over six months. Of these six, two would require jury trial in such contempt cases no matter what the amount of sentence and

b) Two Justices do not believe there is any right at all to a jury trial in such cases. Mr. Justice White did not sit on *Cheff*.

It thus appears that if *Cheff* has application here, the decision below is wrong on two constitutional counts. First, petitioner could not have been sentenced to more

than 6 months without being accorded a jury trial.* Secondly, the contempt charged was not petty since it constituted a felony under the Illinois Criminal Code. *S.H.A. Ch. 38, § 17-3.* Because of this, it is urged that this case presents more serious constitutional questions than *Cheff*. There, the question as to the right to jury trial for a criminal contempt also amounting to a felony could not arise because 18 U.S.C. § 3691 expressly provides such right in cases where the contemptuous conduct charged constitutes "a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted." This fact underlines the holding *Cheff* equating the contempt there reviewed with petty offenses. If such equation was not possible because the contempt charged constituted a felony and if 18 U.S.C. Sec. 3691 had not been enacted, it is evident from the Court's reasoning in *Cheff* that a jury trial in any such case, regardless of sentence, is a matter of constitutional right.

As heretofore noted, the Supreme Court of Illinois determined petitioner's claim of deprivation of his constitutional right to a jury trial by firm reliance on

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* Under Illinois law, if *Cheff* were to be followed, all criminal contempts would be tried to a jury unless waived. This follows from the fact that the four justices in *Cheff* affirming the six month sentence did so only because petty crimes (punishable by six months or less), which they analogized to criminal contempts, are federally triable without juries. In Illinois no such distinction is made and all crimes, petty or otherwise, require jury trials. Article II, Secs. 5 and 9 of the Illinois Constitution. *S.H.A. Ch. 38, Secs. 2-11, 2-12, 103-6, 115-1.* It is therefore evident that because of this and the above reasoning, a trial by jury was here required without regard at all to the amount of punishment imposed.

decisions of this Court interpreting the Constitution of the United States in this field. This, it is urged, amounts to its tacit recognition of the applicability of the United States Constitution to the questions here involved. In any event, the Illinois Supreme Court did not disavow such application although aware of *Gheff*. Even if it did, it is contended that the Fourteenth Amendment to the Constitution provides petitioner with protection in this cause. In this connection, it is pointed out that this Court in recent years has construed that Amendment as incorporating the Bill of Rights. *Griffin* v. *California,* (1965) 380 U. S. 609; *Pointer* v. *State of Texas* (1965) 380 U. S. 400; *Estes* v. *State of Texas,* (1965) 381 U. S. 532; *Gideon* v. *Wainwright* (1963) 372 U. S. 335. This principle was first enunciated by Mr. Justice Black in his dissent in *Adamson* v. *California* (1947) 332 U. S. 46, 68. In 1965, *Adamson* was expressly overruled by *Griffin* indicating that the minority view is tending to become that of the majority.

2. The action of the trial judge in investigating petitioner's conduct and in receiving a secret report relative thereto *in camera,* all prior to the institution of any proceeding against petitioner, deprived petitioner of his constitutional rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. In support of this contention petitioner relies on *In re Murchison,* (1955) 349 U. S. 133, a case not squarely in point on its facts but pertinent and controlling, it is urged, on the principles announced. In that case, this Court held it to be a violation of the Due Process Clause for a state court to try in contempt proceedings a witness it had called before it when it was acting as an investigative one-man grand jury. In so determining the Court stated, p. 136:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter of due process of law.' *Tumey* v. *Ohio,* 273 U.S. 510, 532, 71 L.ed. 749, 758, 47 S.Ct. 437, 50 A.L.R. 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States,* 348 U.S. 11, 99 L.ed., 75 S.Ct. 11."

And at p. 138, this Court stated:

"As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand jury' secret session. His recollection of that is likely to weigh far more heavily with him than any testimony given in the open hearings."

The Supreme Court of Michigan was thereupon reversed.

All of the above poses the due process question of whether a court which has itself investigated a criminal contempt prior to trial can be expected to erase inferences and conclusions arising from matters learned during the investigation. Will it be able to make any nice distinction

between preponderance of evidence and proof beyond reasonable doubt as required in criminal contempt trials? If the evidence on the criminal contempt charge is different from that which it learned of through its investigation, will it be able to expunge from mind or memory that which it learned of prior to trial? And how could anyone know, particularly since the trial court refused to release the entire Fink report so that it could be made part of the Record on Appeal?

3. The comment of the prosecutor as to petitioner's failure to testify violated petitioner's constitutional rights under the Fourteenth Amendment. In support of this contention, petitioner relies on *Griffin* v. *California,* (1965) 380 U.S. 609, flatly holding that the self-incrimination guaranty of the Fifth Amendment in its bearing on the states, by reason of the Fourteenth Amendment, forbids comment by the prosecution on an accused's silence. In so doing, it relied on the following reasoning in *Wilson* v. *United States,* (1893) 149 U.S. 60, which has particular cogency here in view of petitioner's psychiatric testimony. In *Wilson,* it is stated at p. 66:

> "* * * The act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who

from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him."

4. The decision of the Supreme Court of Illinois is believed to be erroneous and contrary to the modern concept of the nature of criminal contempt and how it is to be tried as enunciated by this Court in *Cheff*. Its end result denies fundamental constitutional rights. If carried to its ultimate conclusion, the decision permits the trial of serious crimes under the guise of criminal contempt by a court which in substance is really the aggrieved party and all without the protection of jury trial simply because in a given case the offense also contains contempt elements. It follows also that, under such circumstances, an accused could be severely punished twice for the same conduct if indictment, trial and conviction of the criminal offense followed. Constitutional limitations under the Fifth Amendment as to double jeopardy afford no protection to one so accused. *O'Malley* v. *United States*, (C.A. 8, 1942) 128 F. 2d 676, reversed on other grounds, 317 U.S. 412; *United States* v. *Mirra*, (D.C. N.Y. 1963) 220 F. Supp. 361.

Other important questions also arise in connection with this decision. Thus, to what extent may a trial court punish for criminal contempt? What limitations should be imposed upon it in this respect? Could a trial court impose the death penalty merely because a first degree murder occurred in an area contiguous to the courtroom and therefore in derogation of the Court? Could it do so even if trial of the contempt were by jury? Petitioner concedes the unlikelihood of such an occurrence,

but if the power exists, the possibility of its exercise is always present. It is urged that the Fourteenth Amendment to the Constitution of the United States affords this Court a proper basis for the protection of elemental and fundamental constitutional rights in this controversial field.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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